Petition

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81-1281

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NELDA SANCHEZ

Petitioner

v.

RICHARD S. SCHWEIKER,
Secretary of Health and Human Services

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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December 11, 1981

Question Presented

Whether the statutory five-month waiting period between the onset of disability and the entitlement to Social Security Disability Insurance Benefits begins on the date the wage earner becomes disabled or on the first day of the next month.

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OCTOBER TERM, 1981

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v.

RICHARD S. SCHWEIKER,
Secretary of Health and Human Services

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nelda Sanchez, wife of the wage deceased wage earner, Chris Sanchez, respectfully petitions for the issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit dated September 17, 1981.

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit is reported at 656 F.2d 966. This opinion granted the Secretary's Petition for a Rehearing, and vacated the panel's prior opinion in the case which was reported at 643 F.2d 1128. The panel's final opinion affirmed the judgment of the United States District Court for the Western District of Texas without opinion.

Jurisdiction

The judgment on rehearing by the United States Court of Appeals for the Fifth Circuit was entered on September 17, 1981. This Petition

for Certiorari is filed less than 90 days from that date. The jurisdiction of this Court lies under 28 U.S.C. §1254(1).

Statute Involved

Section 223(c)(2) of the Social Security Act, 42 U.S.C. §423(c)(2) (1976), provides as follows:

> The term "waiting period" means, in the case of any application for disability insurance benefits, the earliest period of five consecutive calendar months—
>
> (A) throughout which the individual with respect to whom such application has been filed has been under a disability, and
>
> (B)(i) which begins not earlier than with the first day of the seventeenth month before the month in which such application is filed if such individual is insured for disability insurance in such seventeenth month, or
>
> (ii) if he is not so insured in such month, which begins

not earlier than with the first day of the first month after such seventeenth month in which he is so insured. Notwithstanding the preceding provisions of this paragraph, no waiting period may begin for any individual before January 1, 1957.

Statement of the Case

On November 15, 1977, the wage earner, Chris Sanchez, was forced to leave his job by his worsening medical condition. When his condition continued to keep him out of work, he filed an application for Social Security disability benefits on March 6, 1978. The Administrative Law Judge who conducted the hearing on the application found the wage earner to have been disabled beginning November 15, 1977. The

wage earner was then advised that the first month for which he was entitled to receive benefits would be May 1978. The wage earner filed an administrative appeal contending that since he became disabled in November 1977, the statutory five-month waiting period between the onset of disability and the payment of benefits was completed in March 1978, and the first month he was entitled to receive benefits would be April 1978, rather than May 1978. The Appeals Council of the Social Security Administration disagreed contending that the waiting period did not begin until December 1, 1977. The wage earner then filed an action in the United States District Court for the Western District of Texas. Jurisdiction lay under 42 U.S.C. §405(g). During the pendency of that action, the wage earner passed

away and his wife, Nelda Sanchez, was substituted as the party plaintiff. On October 9, 1980, the District Court affirmed the Secretary's decision and granted the Secretary's Motion for Summary Judgment.

On appeal the United States Court of Appeals for the Fifth Circuit initially agreed with the wage earner, reversed the decision of the District Court and remanded the case to the Secretary for the award to Plaintiff of an additional month of disability benefits. Sanchez v. Schweiker, 643 F.2d 1128 (5th Cir. 1981) (Sanchez I). Following the Secretary's Petition for a Rehearing, however, the Court of Appeals vacated the prior panel opinion and issued a new opinion affirming the judgment

of the District Court. Sanchez v. Schweiker, 656 F.2d 966 (5th Cir. 1981)(Sanchez II).

Reasons for Granting the Writ

1. The decision below conflicts with the decision of the Sixth Circuit in Otworth v. Finch, 435 F.2d 542 (6th Cir. 1970).

Otworth v. Finch, supra, held that the waiting period begins on the date the wage earner becomes disabled. In that case the Sixth Circuit considered the question of how early a wage earner may begin a period of trial work. 42 U.S.C. §422(c)(3). A wage earner may not begin trial work until after the waiting period. Only one waiting period is defined in the Social Security Act, 42 U.S.C. §423(c)(2),

and it controls both when trial work may begin and when the wage earner is first entitled to disability benefits. The Sixth Circuit held that for that wage earner the waiting period (at that time a six month period) began on the date the disability began, December 11, 1964, and ended six months later on June 11, 1965. Accordingly, when the wage earner returned to work on June 25, 1965, he had completed his waiting period and was entitled to a trial work period. The Sixth Circuit reasoned that the Social Security Act is remedial legislation and should be construed liberally in favor of the claimant, and that to adopt the Secretary's interpretation that the waiting period

begins with the month after the disability would impose on every wage earner a different period depending on how late in the month the disability occurred. Otworth v. Finch, supra, at 543.

The Fifth Circuit relied heavily on this reasoning in its original decision in this case, Sanchez I. It also found support for this view from a close reading of the statute. Thus the Court reasoned that a "calendar month" is generally held to run from a given date in one month to the same numerical day in the next month. Moore v. Industrial Life Ins. Co., 549 S.W.2d 47,48 (Tex.Civ.App.-Dallas 1977, writ ref'd n.r.e.); Matter of PRS Products, Inc., 574 F.2d 414,419 (8th Cir. 1978);

Gammons v. Domestic Loans of Winston-Salem, Inc., 423 F.Supp. 819,822 (M.D.N.C. 1976); Morales v. Reading & Bates Offshore Drilling Co., 392 F.Supp. 41,45 (N.D. Okla. 1975). Moreover, the statute refers to the "earliest period" of five consecutive calendar months which suggests that the waiting period begins when the disability begins rather than arbitrarily waiting until the first day of the following month. Finally, the Court noted several references in the statute to waiting periods which may begin on "the first day of the 17th month" or on "January 1, 1957" which indicate that a waiting period may begin on days other than the first day of the month. The Court

concluded: "We agree with the Sixth Circuit's reasoning in Otworth and will not require claimants for disability benefits to wait longer for those benefits to accrue than the statute obviously contemplates." Sanchez I, at 1131.

In reversing itself on rehearing, the Fifth Circuit did not address any of these considerations. Rather the Court in Sanchez II reasoned that the Social Security Act is set out in terms of entire month increments, that the legislative history supports the Secretary's interpretation, that the Secretary's interpretation is entitled to great weight and that the Secretary's interpretation is simpler to administer.

The Court did not resolve its direct conflict with the holding in Otworth.

Although it is true that the Social Security Act is generally set out in terms of entire month increments, it does not necessarily follow that the waiting period cannot begin on any given day of the month. For example, the wage earner in this case became disabled on November 15. One may either count the five month period as ending on the following April 15, or one can count the five months of November, December, January, February and March as fulfilling the waiting period. In either case, the claimant is entitled to benefits for the month of April.

Nor is it difficult or novel to pay benefits for the last half of a month. As is true in the Supplemental Security Income program, the Aid to Families with Dependent Children program, the Food Stamp program, and most other forms of government benefits, the claimant would simply receive an entire month's worth of benefits even though he was not technically eligible for all 30 or 31 days of the first month of entitlement. The claimant for SSI, for example, who applies on the last day of the month, ultimately receives an entire month's worth of benefits for the month in which he applied. Thus, the Petitioner's interpretation of the waiting period is no more

administratively burdensome than the Secretary's, and is much less arbitrary.

The Fifth Circuit's primary reason in Sanchez II for affirming the Secretary's construction was the legislative history that accompanied the 1972 amendment when the waiting period was reduced from six months to five months. H.R. Rep. No. 231,92d Cong., 1st Sess. 56, reprinted in 1972 U.S. Code & Ad. News 4989,5042. The Court erred in relying so heavily on this legislative history for a number of reasons. First, recourse to legislative history is inappropriate when the meaning of a statute is clear on its face. Southeastern Community College

v. Davis, 442 U.S. 397 (1979). In Sanchez I the Fifth Circuit, after a very close scrutiny of the language of the statute, found that it "obviously" intended for the waiting period to begin on the date the disability began rather than the first day of the next month. Sanchez v. Schweiker, 643 F.2d at 1131. Second, the legislative history the Court looked to concerned not when the waiting period begins but when the waiting period ends. The example cited in the legislative history was intended to demonstrate how the waiting period was to be shortened from six to five months. The Congressman quoted in the legislative history adopted without

question the Secretary's interpretation of when the waiting period begins, because the beginning date of the waiting period was not being altered by the proposed amendment. Whether the waiting period should begin when the disability begins, or some later date, was not being debated. The Secretary's onset date was used merely for convenience in the example of how the waiting period would thereafter be five months rather than six. The legislative history in no way supports the Secretary's construction of how the onset date is determined.

Neither did the Fifth Circuit in Sanchez II resolve its direct conflict with its own earlier hold-

ings in both Davis v. Schweiker, 641 F.2d 283 (5th Cir. 1981) and Malveaux v. Mathews, 546 F.2d 108 (5th Cir. 1977). In Davis and Malveaux the Fifth Circuit held that the waiting period begins on the date the disability begins and ends on the same date of the fifth month thereafter. Thus, not only are the Fifth and Sixth Circuits in disagreement on the issue, but there is confusion in the Fifth Circuit itself as to when the waiting period begins.

Moreover, added to the weight of authority of Otworth, Davis and Malveaux is the Secretary's own regulation which states that the first month of the five month wait-

ing period is not the month after disability but rather the month in which the claimant becomes disabled. "This 5-month waiting period begins with a month in which you were both insured for disability and disabled." 20 C.F.R. §404.315(d)(1980). In summary, Sanchez II conflicts with every other authority on point.

2. The United States Court of Appeals has decided an important question of federal law which has not been, but which should be settled by this Court.

The issue of when the waiting period begins has never been addressed by this Court. It is a question of enormous importance both to the Social Security Administration,

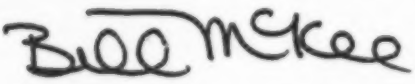
and the millions of wage earners and their dependents who receive Disability Insurance Benefits. If the Petitioner's interpretation is correct, then these many claimants have been denied their full entitlement to their invested earnings and have had to stretch their meager interim resources for an additional month while awaiting their first disability check. Moreover, as exemplified by the Otworth and Davis decisions, the proper interpretation of the waiting period also controls the question of when a disabled wage earner may begin a period of trial work. The Secretary's interpretation would require the wage earner to remain out of the work

force for up to an additional month before venturing into a trial work period. Inasmuch as the same waiting period controls both the initiation of trial work and the timing and amount of benefits awarded to every recipient, the question of when the waiting period begins merits disposition by this Court.

Conclusion

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

Pursuant to Rules 28.3 and 28.4 of the U.S. Supreme Court Rules, I hereby certify that true copies hereof have been sent by Certified Mail, Return Receipt Requested, to: Gabriel Imperato, Attorney, Department of Health and Human Services, Office of General Counsel, 6401 Security Blvd., Room 642 Altemeyer, Baltimore, Md. 21235 and Solicitor General, Department of Justice, Washington, D.C. 20530 on this 14th day of December, 1981.

Bill McKee

BILL MCKEE

Appendix

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APPENDIX

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December 11, 1981

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 19

NO. 80-2355

D.C. Docket No. SA-79-CA-243

NELDA SANCHEZ,

Plaintiff-Appellant,

versus

RICHARD S. SCHWEIKER, Secretary of Health and Human Services,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

---

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

JUDGMENT ON REHEARING

This cause came on to be heard on the defendant-appellee's petition for rehearing;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the opinion originally entered by this Court on April 27, 1981 is vacated; and that the judgment of the said District Court appealed from is hereby affirmed.

September 17, 1981

ISSUED AS MANDATE: Oct. 9, 1981

Nelda SANCHEZ, Plaintiff-Appellant,

v.

Richard S. SCHWEIKER, Secretary of Health and Human Services, Defendant-Appellee.

No. 80-2355.

United States Court of Appeals, Fifth Circuit. Unit A

Sept. 17, 1981.

Appeal from the United States District Court for the Western District of Texas.

ON PETITION FOR REHEARING

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

PER CURIAM:

We GRANT the petition for a rehearing of the Secretary of Health and Human Services and VACATE our prior panel opinion. See Sanchez v. Schweiker, 643 F.2d 1128 (5th Cir. 1981).

The issue in this appeal is whether the statutory five month waiting period between the onset of a disability and the entitlement to Social Security disability insurance benefits of a wage earner, who becomes disabled on a date other than the first day of a month, begins on the date the wage earner becomes disabled or on the first day of the next month.[1] In our original panel opinion we held that the

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1 The Social Security Act provides disability insurance benefits to eligible wage earners "for each month beginning with the first month after his waiting period." Act. §223(a)(1)(i); 42 U.S.C. §423(a)(1)(i)(1976).

The term "waiting period" means, in the case of any application for disability insurance benefits, the earliest period of five consecutive calendar months--

five month waiting period for disability insurance benefits begins on the date the wage earner becomes disabled. We concluded that the term "calendar month," as it is used in the clause defining the waiting period as "the earliest period of five consecutive calendar months...throughout which the individual...has been under a disability,"

(A) throughout which the individual with respect to whom such application has been filed has been under a disability, and
(B) (i) which begins not earlier than with the first day of the seventeenth month before the month in which such application is filed if such individual is insured for disability insurance in such seventeenth month, or (ii) if he is not so insured in such month, which begins not earlier than with the first day of the first month after such seventeenth month in which he is so insured.

Act §223(c)(2):42 U.S.C. §423(c)(2) (1976).

Social Security Act §223(c)(2); 42 U.S.C. §423(c)(2)(1976), "means a month's period of time, whether it be thirty-one, thirty, or twenty-eight days." 643 F.2d at 1130. After considering the petition for a rehearing of the Secretary and the answer of the appellant, see Fed.R.App.P. 40(a), we are persuaded that the term "calendar month" as it is used in defining the waiting period for Social Security disability insurance benefits means a period of time measured from the first day of a month to the last day of a month. Therefore, the five month waiting period for a wage earner who is disabled on a date other than the first day of a month begins on the first day on the succeeding month.

The wage earner, Chris Sanchez,[2] brought this action in United States district court complaining that the Secretary of Health and Human Services had misinterpreted the statutory definition of "waiting period" and, as a result, had deprived him of Social Security disability benefits. Sanchez became disabled on November 15, 1977.[3]

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2 Sanchez originally filed this action in the district court. During its pendency, however, he died and his wife, Nelda Sanchez, was substituted as plaintiff. For simplicity's sake, throughout this opinion the plaintiff-appellant is referred to as "Sanchez."

3 It is conceded by all parties that Sanchez became disabled within the meaning of §223(d)(1) of the Social Security Act, 42 U.S.C. §423(d)(1) (1976), on November 15, 1977.

The Secretary determined that Sanchez' waiting period began on the first day of the month following the onset of his disability, December 1, 1977, and that it expired five months later at the end of April 1978. According to the Secretary's interpretation, Sanchez was first entitled to benefit payments for May 1978. Sanchez claimed that under the Act his waiting period began with the onset of his disability. Thus, according to his analysis, his waiting period ran from November 15, 1977 to April 15, 1978, and disability benefits were due immediately thereafter. The district judge agreed with the Secretary. Sanchez filed this appeal. We now affird the judgment of the district court.

Critical to our decision in this appeal is an understanding of the relationship between Social Security disability insurance benefits and Social Security old-age insurance benefits. As revised in 1939, the Social Security Act provided that otherwise qualified individuals who had attained the age of 65 were entitled to old-age insurance benefits. Social Security Act Amendments of 1939, ch. 666,sec. 201,§202(a), 53 Stat. 1362-1363. The law specifically stated that recipients were entitled to benefits "for each month" and that benefits began with the first "month...such individual bec[a]me...entitled." Id.

By the 1950-s, Congress had become acutely aware of the plight of the

disabled worker. It was apparent that state disability benefit programs were not functioning effectively. Men and women, who were insured to receive old-age benefits under the Social Security Act and were no longer able to work, were being forced in a period of destitution after the onset of their disability until they were eligible to receive old-age benefits at age 65. See H.R. Rep.No. 1189, 84th Cong., 1st Sess. 3-6 (1955); S.Rep.No. 2133, 84th Cong.,2d Sess. 127-34, reprinted in [1956] U.S.Code Cong.§ Ad. News 3877, 3941-47 (minority views of Sens. George, Long & Douglas).

In order to eradicate this problem, Congress expanded the Social Security program to provide disability insurance

benefits as an adjunct to old-age benefits. Under the disability insurance program as it was first established, those insured under the Act who were at least 50 years of age and could prove that they were unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration," Social Security Amendments of 1956, ch. 836, sec. 103,§223(c)(2), 70 Stat. 815, codified as amended, 42 U.S.C. §423(d)(1)(A)(1976), were entitled to receive disability insurance benefits. Id. §223, 70 Stat. 815. Like the old-age insurance program, a

disabled individual was entitled to benefits "for each month, beginning with the first month...he bec[a]me so entitled." Id. §223(a)(1), 70 Stat. 815; see H.R.Rep.No. 1189, 84th Cong., 1st Sess. 27 (1955) ("Monthly disability insurance benefits would be payable beginning with the first month after a...waiting period.. ."). The disability insurance payment was set at an amount eqivalent to that which the insured would have received had he been eligible for old-age insurance benefits. Social Security Amendments of 1956, ch. 836, sec. 103, §223(a)(2) 70 Stat. 815; see H.R.Rep.No. 1189, 84th Cong., 1st Sess. 27 (1955). Because disability insurance was, in fact, early

eligibility for old-age benefits, Congress provided that when the insured became eligible for old-age benefits his monthly disability benefits would cease. Social Security Amendments of 1956, chp. 836, sec. 103, §223(a)(1)(B), 70 Stat. 815; see H.R.Rep.No. 1189, 84th Cong., 1st Sess. 27 (1955).

It is against this background of eligibility determinations and benefit payments "for each month" that we must interpret the statute before us now. See United States v. Alexander, 602 F.2d 1228,1231 (5th Cir. 1979) ("a particular clause or phrase of a statute cannot be read in isolation but must be construed as part of a statutory whole"); Haberman v. Finch, 418 F.2d 664,666 (2nd Cir. 1969).

When originally enacted as a supplement to old-age insurance benefits in 1956, Congress provided that an applicant for disability insurance benefits must satisfy a waiting period of "the earliest period of six consecutive calendar months."[4] Social Security Amendments of 1956, ch. 836, sec. 103, §223(c)(3), 70 Stat. 816, codified as amended, 42 U.S.C. §423(c)(2)(1976). Although the legislative history provides only a limited explanation

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4 Congress reduced the statutory waiting period for disability benefits from six to five months in 1972. Social Security Amendments of 1972, Pub.L. No. 92-603, sec. 116(a), 86 Stat. 1350.

of Congress' interpretation of this provision,[5] we are convinced that Congress meant to continue the established practice under the Social Security Act whereby recipients both qualified for and received benefits for each month. The Social Security Admendments of 1956 itself defines an eligible recipient by providing "[a]n individual shall be insured for disability insurance benefits in

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5 Because the Senate Finance Committee recommended against providing disability benefits under the Social Security Act, see S.Rep.No. 2133, 84th Cong., 2nd Sess. 3-5, reprinted in [1956] U.S.Code Cong.& Ad. News 3877,3879-81, the only explanation of the statutory waiting period is contained in the report of the House Ways and Means Committee.

any month." Social Security Amendments of 1956, ch. 836, sec. 103, §223(c)(1), 70 Stat. 815. The accompanying House report notes that "disability insurance benefits would be payable with the first month." H.R.Rep. No. 1189, 84th Cong., 1st Sess. 27 (1955). In that context the term "calendar month" as it is used in section 223(c)(2) of the Social Security Act, 42 U.S.C. §423(c)(2) of the Social Security Act, 42 U.S.C. §423(c)(2)(1976), means a period of time beginning on the first day of the month and ending on the last day of the same month.

We are fortified in our conclusion by examples in reports of both of the congressional committees charged

with overseeing the operation of the Social Security Act. When section 223(c)(2) of the Social Security Act, 42 U.S.C. §423(c)(2)(1970), was amended in 1972 to reduce the waiting period for disability insurance benefits from six to five months,[6] reports accompanying the legislation in both Houses of Congress included a case demonstrating a situation in which, as here, the wage earner became disabled on a date other than

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[6] See note 4, supra.

the first day of the month.[7] Both

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7 We, of course, recognize that a report of a congressional committee in 1972, 16 years after Congress enacted the disability insurance program in the Social Security Admendments of 1956, neither forms a part of the legislative history surrounding the passage of the 1956 Amendments nor sheds any light on the intent of the Congress that originally enacted the disability insurance program. Oscar Meyer & Co. v. Evans, 441 U.S. 750, 757, 99 S.Ct. 2066, 2072, 60 L.Ed. 2d 609 (1979). Nevertheless, "Congress is presumed to be aware of an administrative...interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." Lorillard v. Pons, 434 U.S. 575, 580, 98 S.Ct. 866, 870, 55 L.Ed.2d 40 (1978). Thus, here when Congress re-enacted the statutory waiting period without a change in the language other than substituting a "five" for a "six," and it referred in its committee reports to the current administrative interpretation, we are guided by the administrative interpretation of the statute as reflecting the intent of Congress. United States v. Board of Commissioners, 435 U.S. 110, 134, 98 S.Ct. 965, 980, 55 L.Ed.2d 148 (1978).

examples show that the statutory waiting period begins on the first day of the month following the onset of the disability. Specifically, the report of the House Ways and Means Committee provides:

> Your committee's bill would reduce the waiting period for disability insurance benefits by one month. Under present law, entitlement to disability benefits cannot begin until after a worker has been disabled through a waiting period of 6 consecutive full months. For example, if a worker becomes disabled on January 10, the waiting period is the 6 full months February through July, his first month of entitlement to benefits is August, and the first benefit check is payable in early September....[T]his latter provision would not be changed by your committee's bill.

H.R.Rep.No. 231,92d Cong.,1st Sess. 56, reprinted in [1972] U.S.Code & Ad.

News 4989,5042.[8]

We are also reluctant to substitute our construction of the statute for that of the Secretary.

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8 The report of the Senate Finance Committee incorporated the same example used in the report of the House Ways and Means Committee.

> Under present law, entitlement to disability benefits cannot begin until after a worker has been disabled throughout a waiting period of 6 consecutive full months. For example, if a worker becomes disabled on January 10, the waiting period is the 6 full months February through July; his first month of entitlement to benefits is Ausust, and the first benefit check is payable in September. No benefit is payable, however, unless the disability is expected to last (or has lasted) at least 12 consecutive months, or to result in death.

S.Rep.No. 1230, 92nd Cong., 2d Sess. 158 (1972).

The Secretary of Health and Human Services is the principal executive official charged with administering the Social Security Act. He and his predecessors consistently have interpreted the statutory waiting period for disability benefits to begin on the first day of a month. See, e.g. 20 C.F.R. §404.308 (1965), 29 Fed.Reg. 12,286 (1964); 20 C.F.R. §404.308(1971), 33 Fed.Reg. 13 (1968).[9]

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9 Regulations adopted in 1964 demonstrate that the Secretary and his predeceassors consistently have interpreted the statutory waiting period to consist of "calendar months" that begin on the first day of a month and end on the last day of a month. The 1964 regulations provided that "[a] waiting period is...6 full consecutive calendar months." 29 Fed.Reg. 12,286(1964), codified in 20 C.F.R.

Furthermore, as demonstrated by the congressional committee reports, when

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§404.308(1965)(emphasis added). The 1964 regulations also provided that if an individual's disability began "on the first day of the month and continues through the last day of the month, such month shall be considered as a full calendar month." Id. If the Secretary had construed the statute as beginning the waiting period on a date other than the first day of a month, there would have been no reason for the Secretary to include this provision.

A later revision of the regulations clearly demonstrates that the Secretary has adhered to his interpretation that the statutory waiting period begins on the first day of a month. These regulations originally appeared in 1974 and also refer to a waiting period as consisting of "full consecutive calendar months." 39 Fed.Reg. 21,047 (1974), codified in 20 C.F.R. §404.308(1979)(emphasis added). These regulations also contain the example of the wage earner who becomes disabled on the first day of the month. As before,

Congress shortened the waiting period from six to five months it did so fully aware of the Secretary's interpretation of the statute. Under these circumstances, the Secretary's construction of the statutory waiting period is entitled to "great weight." See Saxbe v. Bustos, 419 U.S. 65,74,95 S.Ct. 272,279,42 L.Ed.2d 231(1974)

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this individual's waiting period begins on the day he became disabled--the first day of a month. Id.

The most recent revision of the regulations does not contain the specific language used in previous regulations. See 20 C.F.R. §404.-320(b)(4)(1981). This revision, however, was intended to explain the Secretary's policies in plain language. No change in substance was intended. See 44 Fed.Reg.34,479 (1979)("The primary purpose of this recodification is to restate the rules so that they will be easier for the public to understand and use.").

("This longstanding administrative construction is entitled to great weight, particularly when, as here, Congress has revisited the Act and left the practice untouched. Such a history of administrative construction and congressional acquiescence may add a gloss or qualification to what is on its face unqualified statutory language."); Ford Motor Credit v. Vilhollin, 444 U.S. 555,565,100 S.Ct. 790,797, 63 L.Ed.2d 22 (1980); see generally 2 K. Davis, Administrative Law Treatise §7:14 (2d ed. 1979).

Moreover, we are convinced that the Secretary's interpretation of the statute may be justified on

the grounds of administrative simplicity. Clearly, his interpretation establishes a more efficient administration of the disability insurance program. By selecting one date, the first day of each month, rather than many, on which to begin payments, more of the system's assets will be channeled away from administrative costs and to the beneficiaries.

We hold that Sanchez, who became disabled on November 15, 1977, began his statutory waiting period on December 1, 1977. He completed his statutory waiting period at the end of April 1978. He is entitled to disability insurance benefits

with the month of May 1978.[10]

The judgment of the district court is AFFIRMED.

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10 Other than the decision of this panel in our prior opinion, our research has uncovered no decision of another court of the United States that has squarely decided whether the waiting period of a wage earner who is disabled on a date other than the first day of a month begins with the onset of the disability or on the first day of the next month. Those opinions that do not seem to coincide with our decision are, upon closer examination, cases in which this issue was not presented to the court. See, e.g., Malveaux v. Mathews, 546 F.2d 542,543 (6th Cir. 1970), primarily focused on the construction of §222(c) of the Act, 42 U.S.C. §422(c) (1964), and, to the extent that the court may have held that the phrase "'six consecutive months' means one half year," 435 F.2d at 543, instead of a period of time beginning with the first day of a month, its decision was substantially undermined by the legislative history of the Social Security Amendments of 1972. See text

accompanying notes 6-8. Indeed, many recent opinions are consistent with our decision. See, e.g., Davis v. Schweiker, 641 F.2d 283 (5th Cir. 1981); Campbell v. Califano, 483 F.Supp. 1306 (E.D.Pa. 1980).

Nelda SANCHEZ, Plaintiff-Appellant,

v.

Richard S. SCHWEIKER, Secretary of Health and Human Services, Defendant-Appellee.

No. 80-2355

Summary Calendar.

United States Court of Appeals, Fifth Circuit. Unit A.

April 27, 1981.

Appeal from the United States District Court for the Western District of Texas.

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

PER CURIAM:

The Social Security Act provides for disability insurance benefits for eligible wage earners "for each month beginning with the first month after his waiting period."

42 U.S.C. §423(a)(1)(i). The waiting period is defined as "the earliest period of five consecutive calendar months...throughout which the individual...has been under a disability." 42 U.S.C. §423(c)(2).[1] The wage

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1 The entire provision reads as follows:

(2) The term waiting period means, in the case of any application for disability insurance benefits, the earliest period of five consecutive calendar months--
(A) throughout which the individual with respect to whom such application is failed has been under a disability, and
(B)(i) which begins not earlier than with the first day of the seventeenth month before the month in which such application is filed if such individual is insured for disability insurance benefits in such seventeenth month, or (ii) if he is not so insured in such months, which begins not earlier than with the first day of the first month after such seventeenth month in which he is so insured.

earner here, Chris Sanchez,[2] brought this suit claiming that the Secretary of Health and Humsn Services wrongly interpreted the statutory definition of "waiting period" and, in doing so, deprived him of Social Security disability benefits. Sanchez claims

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Notwithstanding the preceding provisions of this paragraph, no waiting period may begin for any individual before January 1, 1957.

2 Sanchez originally filed this action with the district court. During its pendency, however, he died and his wife, Nelda Sanchez, was substituted as plaintiff. For simplicity's sake, throughout this opinion the plaintiff-appellant will be referred to as "the wage earner" or "Sanchez."

that the waiting period began on the day he became disabled, November 15, 1977.[3] The Secretary contends that the waiting period began on the first day of the month following the onset of the disability, December 1, 1977, because the statute requires that only entire calendar months be counted. The Appeals Council of the Social Security Administration and the district court agreed with the Secretary's interpretation. We disagree.

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3 It is conceded by all parties that Sanchez became disabled within the meaning of the Social Security Act, 42 U.S.C. §423(d)(1), on November 15, 1977.

The Secretary, in her interpretation of the statute, puts great emphasis on the inclusion of the word "calendar" in the statute. She contends that a "calendar month" must run from the first day of a month to the last day of that same month. Under her interpretation, Sanchez' five month waiting period runs from December 1, 1977 to May 1, 1978, with May 1978 being the first month in which he is entitled to benefit payments.

We decline to give the inclusion of the word "calendar" such importance. It is true that "calendar month" may have the meaning given to it by the Secretary in certain contexts. But a "calendar month" may also run from

any given day in one month to the day of the corresponding number in the next month. "Calendar month" here means a month's period of time, whether it be thirty-one, thirty, or twenty-eight days. Five consecutive calendar months of disability for Sanchez ran from November 15, 1977 to April 15, 1978.

Our interpretation of the statute is further supported by the phrase "the earliest period of five consecutive calendar months" (emphasis added). This phrase has no meaning whatsoever if one were to interpret the statute as did the district court. Its inclusion suggests that the waiting period is to begin on the specific day on which the disability begins rather than waiting until the first day of the following month.

The language of §423(c)(2)(B) also supports our interpretation of part (A) of that section. Subparagraph (B) sets a limit on the earliest point at which the waiting period may begin. The waiting period may begin no earlier than "the first day of the seventeenth month" (emphasis added) before the application of disability benefits is filed. This indicates that the waiting period as defined in (A) may begin on days other than the first day of a month.

This is a question of first impression for this circuit. In Malveaux v. Mathews, 546 F.2d 108 (5th Cir. 1977), however, a panel of this court set the proper starting date for disability benefits at

May 26, 1972, when the disability began on December 26, 1971. There the district court had set the date of eligibility on the date of disability, failing to take the five month waiting period into account. That panel was not called on to construe the phrase that we must construe today, but its judgment contradicts the Secretary's argument that her interpretation complies with the plain meaning of the statute.

The only other court of appeals to expressly consider the issue of when the statutory waiting period begins came to the same decision as we do. In considering the statute as it existed before the 1972

amendments that changed the waiting period from six months to five months, Social Security Amendments of 1972, Pub.L.92-603, Title I, §116(a),86 Stat. 1350, the Sixth Circuit said:

> "We are unable to accept the Secretary's interpretation of the phrase. The Social Security Act is to be construed liberally in favor of the claimant. Davidson v. Gardner, 370 F.2d 803 (6th Cir. 1966). Although we realize that a line must be drawn somewhere with respect to the 'waiting period,' the drawing of that line must bear some reasonable relationship to the purposes of the Act. In the present case, the appellee had been disabled for over a half year consecutively. This period fully satisfies the requirement of the Act insofar as the element of time is concerned. The phrase in question is concerned with the length of time an individual must be disabled before he may receive benefits. Under the Secretary's interpretation, the period of

> time required would vary from individual to individual depending upon how late in the month the disability occurred. We are of the view that it was the purpose of the Act to provide a uniform time period for all cases and that the District Court's finding that 'six consecutive calendar months' means one half year is the correct interpretation. The appellee was disabled and out of work for over one half year and was thus entitled to the benefits afforded him under the Act."

Otworth v. Finch, 435 F.2d 542,543 (6th Cir. 1970).[4]

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4 The Sixth Circuit was considering 42 U.S.C. §422(c)(3), which sets the allowable period of trial work for a disabled person entitled to benefits under the Act. That section provides: "a period of trial work...shall begin with the month in which he becomes entitled to disability insurance benefits." Since a person is entitled to disability insurance benefits only after he completes the waiting

We are also required to consider the remedial purposes of the Social Security Act and broadly construe the statute in favor of coverage if such a construction is reasonable. Broussard v. Weinberger, 499 F.2d 969,970 (5th Cir. 1974). We agree with the Sixth Circuit's reasoning in Otworth and will not require claimants for disability benefits to wait longer for those benefits to accrue than the statute obviously contemplates.

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period defined in §423(c)(2), it became necessary for the court to consider that section in determining whether the wage earner had begun work after the period of trial work began.

We hold that Sanchez completed his statutory waiting period on April 15, 1978, and is entitled to disability benefits as of that date.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

NELDA SANCHEZ for
CHRIS SANCHEZ

v. SA 79 CA 243

PATRICIA ROBERTS HARRIS,
Secretary of Health,
Education and Welfare

JUDGMENT

This action came on for consideration before the Court and any objections to the Magistrate's Findings and Recommendations having been examined and all issues having been fully considered:

It is therefore, ORDERED, ADJUDGED and DECREED that judgment be rendered in favor of the Defendant.

ENTERED at San Antonio, Texas, this the 9th day of October, 1980.

FRED SHANNON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

NELDA SANCHEZ for
CHRIS SANCHEZ

v. SA 79 CA 243

PATRICIA ROBERTS HARRIS
Secretary of Health,
Education and Welfare

O R D E R

On this date came on to be considered Plaintiff's Motion for Summary Judgment; and Defendant's Motion for Summary Judgment. The Court has carefully examined the Findings and Recommendations of the Honorable Robert B. O'Connor, United States Magistrate, to whom a review of the case was duly assigned pursuant to 28 United States Code 636(b) and the Local Rules of the Western District of

Texas, together with any objections thereto, and is of the opinion and finds that the magistrate's report should be approved, and as approved, it is adopted and made a part hereof. It is accordingly

ORDERED that Plaintiff's Motion for Summary Judgment be DENIED: and that Defendant's Motion for Summary Judgment be, and it is hereby in all things, GRANTED.

SIGNED this the 9th day of October, 1980.

FRED SHANNON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

NELDA SANCHEZ for
CHRIS SANCHEZ

v. SA 79 CA 243

PATRICIA ROBERTS HARRIS
Secretary of Health,
Education and Welfare

FINDINGS AND RECOMMENDATIONS OF
THE UNITED STATES MAGISTRATE

TO: Honorable Adrian A. Spears
United States District Judge

Plaintiff brings this action under the provisions of Title 42 United States Code Section 405(g) seeking judicial review of the final decision of the Secretary awarding monthly disability benefits to Chris Sanchez, deceased, effective May 1, 1978.

Specifically, Plaintiff has moved for summary judgment, requesting the Court to reverse the decision of the Secretary as being an erroneous interpretation of the phrase "waiting period" as that phrase is used in Title 42 United States Code Section 423(c)(2). The Secretary has filed her motion for summary judgment contending that her interpretation of the statute is consistent with the intent of Congress.

Administrative Proceedings

Plaintiff filed applications for disability insurance benefits and supplemental security income on March 6, 1978. Plaintiff alleged that he became unable to work on November 15, 1977, because of kidney disease and a heart

condition. The applications were denied administratively, both initially and on reconsideration. Subsequently, plaintiff was granted a hearing de novo before an administrative law judge. On October 13, 1978, the administrative law judge issued his decision finding that Plaintiff became disabled within the meaning of the Social Security Act on November 15, 1977 (Tr. 15-16).

Plaintiff was advised that benefits would be payable beginning in May 1978, after the end of the statutory five month waiting period. Plaintiff, through his counsel, appealed this action to the Appeals Council, contending that benefits should have begun on April 15, 1978. The Appeals

Council affirmed the decision of the Administration to commence the payment of benefits in May 1978. (Tr. 3-4).

Issue

The only issue before the Court in this action is whether the five months "waiting period" begins on the day the disability begins or the first day of the next month.

Authorities

The "waiting period" is defined in Title 42 United States Code Section 423(c)(2) which provides:

> The term "waiting period" means, in the case of any application for disability insurance benefits, the earliest period of five consecutive calendar months--
>
> (A) throughout which the individual with respect to whom such application is filed has been under a disability, and

> (B)(i) which begins not earlier than with the first day of the seventeenth month in which such application is filed if such individual is insured for disability insurance benefits in such seventeenth month, or (ii) if he is not so insured in such month, which begins not earlier than the first day of the first month after such seventeenth month in which he is so insured.

Notwithstanding the preceding provision of this paragraph, no waiting period may begin for any individual before January 1, 1957.

Prior to the 1972 Amendments of the Social Security Act, the waiting period lasted six months rather than five months as it does now.

The Plaintiff relies upon Otworth v. Finch, 435 F.2d 542 (6th Cir. 1970) and Malveaux v. Mathews, 546 F.2d 108 (5th Cir. 1977). In

Otworth, the Court held that the waiting period begins to run on the day the disability begins, rather than on the first day of the next month. The evidence established that a wage earner injured his back on December 11, 1964. The Social Securith Office was mistakenly informed that he returned to work on July 2, 1965. The Secretary calculated that the then six month waiting period (prior to the 1972 amendment) ended on July 1, 1965, and that the wage earner was entitled to a nine month trial work period beginning July 2, 1965. In January 1966, the Secretary learned that the wage earner had in fact returned to work on June 25, 1965. Because a trial work period cannot

begin until after the waiting period is completed, Title 42 United States Code Section 422(c)(3), and because the Secretary figured the waiting period to begin on January 1, 1965, and end on July 1, 1965, the Secretary declared that all the benefits paid this wage earner was an overpayment and should be refunded. The District Court and the Sixth Circuit disagreed. They both held that the waiting period began on the date the disability began, December 11, 1964, and ended six months later on June 11, 1965. When the wage earner returned to work on June 25, 1965, he had completed his waiting period and, because he had been found disabled, entitled to a trial work period beginning

June 20, 1965. The Court held the wage earner had not been overpaid. The Court stated:

> "The Social Security Act is to be construed liberally in favor of the claimant. Davidson v. Gardner, 370 F.2d 803 (6th Cir. 1966). Although we realize that a line must be drawn somewhere with respect to the "waiting period," the drawing of that line must bear some reasonable relationship to the purposes of the Act. In the present case, the appellee had been disabled for over a half year consecutively.
>
> This period fully satisfies the requirement of the Act insofar as the element of time is concerned. The phrase in question is concerned with the length of time an individual must be disabled before he may receive benefits.
>
> Under the Secretary's interpretation, the period of time required would vary from individual to individual depending on how late in the month

> the disability occurred. We are of the view that it was the purpose of the Act to provide a uniform time period for all cases and that the District Court's findings that 'six consecutive calendar months' means one half year is the correct interpretation. The Appellee was disabled and out of work for one half year and was thus entitled to the benefits afforded him under the Act. We are not persuaded to the contrary by the appellant's argument that the waiting period must begin on the first day of a calendar month since payments are based on full months." Otworth at 543-544.

The Malveaux case supra, by the Fifth Circuit held that the proper starting date for disabled widows social security insurance benefits was the date five months from the date on which she became disabled (five months subsequent to 12-26-71 or 5-26-71). The question of the construction or

interpretation of Title 42 United States Code Section 423(c)(2) was not in issue. The district court found the claimant's disability began December 26, 1971, but failed to take into account the five months "waiting period" that the statute requires, and ordered payment to begin December 26, 1971. The Fifth Circuit affirmed the judgment of the district court but found the proper starting date for claimant's benefits was May 26, 1972. Since the Fifth Circuit Court of Appeals was not called upon to construe the phrase "five consecutive calendar months" contained in Title 42 United States Code Section 423(c)(2), the legal issue before the Sixth Circuit Court of Appeals in Otworth v. Finch,

supra was not an issue to be decided by the Fifth Circuit of Appeals in Malveaux v. Mathews, supra. The Court in Malveaux did not refer to the Otworth case or specifically interpret the provision of the statute (42 USC 423 (c)(2)) construed by the Sixth Circuit in Otworth. It, therefore, is not certain how the Fifth Circuit would construe the phrase "five consecutive calendar months", if such were assigned as a point of error in a future case on appeal.

In 1972, Section 223(c)(2) of the Act was amended to reduce the statutory waiting period to "five consecutive calendar months." The House Committee report included the following example which clearly

demonstrates that Congress intended the waiting period to be composed of five full calendar months and not a period of days.

> "Your committee's bill would reduce the waiting period for disability insurance benefits by one month. Under present law, entitlement to disability benefits cannot begin until after a worker has been disabled throughout a waiting period of 6 consecutive full months. For example, if a worker becomes disabled on January 10, the waiting period is the 6 full months February through July; his first month of entitlement to benefits is August, and the first benefit check is payable early in September."

H.R. Rep. No. 92-231, 92nd Congress, 2nd Sessions, reprinted in 1972 U.S. Code Cong. § Ad. News 5042. The legislative history of this amendment to Section 223(c)(2) clearly rebuts the interpretation Plaintiff contends

was given to the words "five consecutive months" in Malveaux v. Mathews, supra.

Black's Law Dictionary (revised Fourth Edition 1968) defines:

> Calendar Month - One of the months of the year as enumerated in the calendar.
>
> Calendar Week - A block of seven days registered on calendar beginning with Sunday and ending with Saturday.
>
> Calendar Year - The period from January 1 to December 31, inclusive.

Webster's New Collegiate Dictionary (G.&C. Merriam Co. 1975) defines:

> Calendar Year: A period of a year beginning and ending with the dates that are conventionally accepted as marking the beginning and end of a numbered year (as January 1 and December 31 in the Georgian calendar).

Webster's New World Dictionary of the American Language (The World Publishing Company, Second Collegiate Edition 1972) defines:

Calendar Year - The period of time from January 1 through December 31 - distinguished from fiscal year.

The legal question to be resolved is the correct starting date of the "waiting period" which rests on the interpretation of the phrase "six consecutive calendar months," contained in the applicable section of the Social Security Act, Title 42 United States Code Section 422(c)(2)-(3), which is addressed by the Sixth Circuit in Otworth v. Finch, supra, which disregarded the generally accepted meaning of the word "calendar" and under the legal principle that "the Social Security Act" is to be construed liberally

in favor of the claimant and construed the phrase "six consecutive calendar months" to mean that claimant's waiting period began on the day of disability and not on the first day of the month following the month in which the disability was sustained. I agree with the equity of the result reached in the Otworth case in that it standardized the waiting period for all claimants. As practical as establishing a uniform and standard waiting period for all claimants is, it nevertheless, totally disregards the apparent intent of Congress as reflected by the House Committee Report set out hereinabove and the generally accepted meaning of the word "calendar". The exclusive right to exercise legislative power is vested by the

Constitution, Article I, Section I in a Congress of the United States. I, therefore, respectfully question the power of the Court to amend a statute of Congress under the principle of "liberal construction" notwithstanding the justness of the result. An amendment of the statute by Congress would be the proper procedure and consistent with the separation of governmental powers.

Findings

I find that the decision of the Secretary of Health, Education and Welfare that the deceased claimant was not entitled to receive disability insurance benefits prior to May 1, 1980, should be affirmed.

Recommendations

1. The Plaintiff's Motion for Summary Judgment should be DENIED.

2. The Defendant's Motion for Summary Judgment should be GRANTED, and judgment entered for Defendant.

The Clerk shall serve a copy hereof upon all parties by mailing such copy by Certified Mail, Return Receipt Requested, to all attorneys of record and to the Plaintiff. Any party may serve and file written objections to such findings and recommendations within ten (10) days after being served.

Signed this the 30th day of May, 1980.

ROBERT B. O'CONNOR
United States Magistrate

June 7, 1979

ACTION OF APPEALS COUNCIL
ON REQUEST FOR REVIEW

Mr. Chris Sanchez
619 West Pyron
San Antonio, Texas 78221

Dear Mr. Sanchez:

Re: Your Claims for Disability Insurance Benefits and Supplemental Security Income

After the request for review of the hearing decision was received, a careful study was made of your case, the applicable law and regulations, the record before the administrative law judge, and the contentions made in support of the request.

Sections 404.947a and 416.1465 of the Social Security Administration Regulations Nos. 4 and 16 (20 CFR 404.947a and 416.1465) provide that the

Appeals Council will review a hearing decision where: (1) there appears to be an abuse of discretion by the administrative law judge; (2) there is an error of law; (3) the administrative law judge's action, findings, or conclusions are not supported by substantial evidence, or (4) there is a broad policy or procedural issue which may affect the general public interest.

The Appeals Council has concluded that there is no basis under the above regulations for granting the request for review. Accordingly, the hearing decision stands as the final decision of the Secretary in your case.

In reaching this conclusion, the Appeals Council carefully considered

the contentions by your attorney that the waiting period ended on April 15, 1978, and that you were entitled to benefits for the remainder of the month. However, section 223(c)(2)(A) of the Social Security Act defines "waiting period" as the earliest period of 5 consecutive calendar months throughout which an individual has been under a disability. Since December 1977 was the first calendar month throughout which you were under a disability, the 5-month consecutive period ends with the close of April 1978. As a result, May 1978 is the first month of your entitlement to disability insurance benefits.

If you desire a court review of the hearing decision, you may commence a civil action in the district

court of the United States in the judicial district in which you reside within sixty (60) days from the date of receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing is otherwise made. See sections 205(g) and 1631(c)(3) of the Social Security Act, as amended (42 U.S.C. 405(g) and 1383(c)(3)) and section 422.210 of Social Security Administration Regulations No. 22 (20 CFR 422.210).

If a civil action is commenced, the Bill of Complaint should name the Secretary of Health, Education and Welfare as the defendant and should include the social security number(s)

shows at the top of this notice.

Sincerely yours,

Kenneth Cooper
Member, Appeals Council

cc:

Mr. Bill McKee
Attorney at Law
San Antonio, Texas 78204

Opposition

Supreme Court, U.S.
FILED
MAR 31 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1281

In the Supreme Court of the United States

OCTOBER TERM, 1981

NELDA SANCHEZ, PETITIONER

v.

RICHARD S. SCHWEIKER,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1281

NELDA SANCHEZ, PETITIONER

v.

RICHARD S. SCHWEIKER,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner seeks review of the court of appeals' holding that the five-month waiting period established by 42 U.S.C. 423(c)(2), between the onset of disability and entitlement to Social Security wage earner disability insurance benefits, begins on the first day of the first full month of disability, rather than on the actual date of onset of the disability.[1]

[1]Section 223(a)(1)(i) of the Social Security Act grants disability insurance benefits to eligible wage earners "for each month beginning with the first month after his waiting period." 42 U.S.C. 423(a)(1)(i). The statutory definition of the term "waiting period" provides (Section 223(c)(2), 42 U.S.C. 423(c)(2)):

> The term "waiting period" means * * * the earliest period of five consecutive calendar months—(A) throughout which the individual * * * has been under a disability * * *.

1. Petitioner became disabled within the meaning of 42 U.S.C. 423(d)(1) on November 15, 1977 (Pet. App. 29).[2] The Secretary, acting through an administrative law judge, determined that petitioner's waiting period for disability benefits began on the first day of the first full calendar month of his disability, December 1, 1977, and expired five months later at the end of April 1978. Under the Secretary's interpretation, petitioner first became entitled to benefit payments on May 1, 1978. Petitioner claimed, however, that his waiting period began on November 15, 1977, with the onset of his disability, and ended on April 15, 1978, with disability benefits due immediately thereafter (*id.* at 30).[3] We are informed that the sum in dispute amounts to no more than $325. Petitioner's administrative appeal was unsuccessful.

Petitioner filed this action in the United States District Court for the Western District of Texas, challenging the denial of disability benefits for the latter half of April 1978. Adopting the recommendation of a United States Magistrate (Pet. App. 65-81), the district court (*id.* at 63-64) upheld the Secretary's action. In its initial opinion (*id.* at 50-61), the court of appeals reversed.[4]

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[2]Chris Sanchez, the wage earner, died while this action was pending in the district court, and his widow was substituted as plaintiff. For convenience, we employ the term "petitioner" to refer to both the wage earner and his widow, as the context requires.

[3]Alternatively, petitioner claimed that his statutory waiting period consisted of the months November 1977 through March 1978, and that he was entitled to benefits for the period commencing April 1, 1978 (see Pet. 5). This contention was apparently abandoned in the court of appeals, but is renewed in the petition (Pet. 12-13).

[4]The court of appeals found insufficient (Pet. App. 54-55) the Secretary's argument that the definition of the waiting period as "five consecutive *calendar* months" (42 U.S.C. 423(c)(2); emphasis added) denotes five full calendar months. In support of its decision the court also cited (Pet. App. 57-59) *Otworth* v. *Finch*, 435 F. 2d 542, 543 (6th Cir. 1970), and invoked a rule of liberal construction said to be applicable to Social Security Act questions generally (Pet. App. 59-60).

The Secretary petitioned the panel for rehearing and suggested en banc review as well, because of the severe adverse impact the panel's initial decision would have had upon the administration of the Social Security Act and because of legislative history squarely contrary to the panel's disposition. The panel granted the government's petition for rehearing, vacated its prior opinion, and substituted a new opinion (Pet. App. 25-49), affirming the decision of the district court. The court stressed (*id.* at 32-42) portions of the legislative history of 1972 amendments to the waiting period provision that explicitly recognized the Secretary's view of the onset of the waiting period. See H.R. Rep. No. 92-231, 92d Cong., 1st Sess. 56 (1971); S. Rep. No. 92-1230, 92d Cong., 2d Sess. 158 (1972).[5] The court also found support for the Secretary's interpretation of the statute in the various regulations issued since its enactment (Pet. App. 42-46 & n.9), and concluded that the Secretary's interpretation was a reasonable one, in light of

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[5]The 1972 amendments reduced the waiting period from six months to the present five months. The language of the House Report, which has been commercially reprinted ([1972] U.S. Code Cong. & Ad. News 4989, 5042), but not that of the Senate Report, which is not similarly available, was placed before the panel in the government's brief filed prior to the panel's initial decision. Petitioner, however, without citing any specific language from the Senate Report, which, he explained, was unavailable to him, suggested in his court of appeals brief (Br. 14) that the Senate would not have joined in the House's approval of the Secretary's view as to when the waiting period begins. This suggestion rested solely upon an indication in the (commercially reprinted) Conference Report, H.R. Conf. Rep. No. 92-1605, 92d Cong., 2d Sess. (1972), that the Senate version of the bill would have reduced the waiting period to *four* months. The panel, in its original opinion, took no note of the legislative history. In the Secretary's petition for rehearing, the governing language of both the House and Senate Reports (see pages 5-6, *infra*) was highlighted. This language became the centerpiece of the court of appeals' opinion on rehearing.

the ease of administration resulting from its application (*id.* at 46-47).[6] In addition, the court observed (*id.* at 31-38) that the disability benefits program was, historically, an outgrowth of the more familiar old-age benefits aspect of the Social Security Act, under which, Congress was aware, benefits are paid only for full calendar months during which the recipient is entitled to benefits.

2.a. Contrary to petitioner's submission (Pet. 7-10), any inconsistency between the decision below and the Sixth Circuit's decision in *Otworth* v. *Finch*, 435 F. 2d 542 (1970), does not warrant this Court's review. In *Otworth*, the Sixth Circuit construed 42 U.S.C. 422(c), which governs the onset of a trial period of work,[7] rather than the onset of the waiting period for disability benefits—governed by 42 U.S.C. 423(c)(2)—the issue in this case. To be sure, as petitioner observes (Pet. 7-8), pursuant to 42 U.S.C. 422(c)(3) the trial work period "begin[s] with the month in which [the individual] becomes entitled to disability insurance benefits," a formulation which in turn requires interpretation of Section 423(c)(2)—the waiting period definition. However, as the court below correctly observed (Pet. App. 48 n.10),[8] *Otworth* was decided prior to the 1972

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[6]The court distinguished *Otworth* v. *Finch*, 435 F. 2d 542, 543 (6th Cir. 1970), upon which it had previously relied (see note 4, *supra*), noting, *inter alia*, that *Otworth* had been decided prior to enactment of the 1972 Social Security Act amendments (Pet. App. 48 n.10; see also note 8, *infra*).

[7]Employment during such a formal trial work period is not held against the applicant for disability benefits as evidence of employability. 42 U.S.C. 422(c)(2).

[8]Petitioner's appendix omits a portion of the cited footnote distinguishing *Otworth*. The court explained (656 F. 2d at 971 n.10):

> The Sixth Circuit's decision in *Otworth* v. *Finch*, 435 F. 2d 542, 543 (6th Cir. 1970), primarily focused on the construction of § 222(c) of the Act, 42 U.S.C. § 422(c) (1964), and, to the extent that the court may have held that the phrase " 'six consecutive

amendments to the Social Security Act, the legislative history of which persuaded the panel to vacate its original decision. There is little reason to believe that the Sixth Circuit or any other court would continue to deem *Otworth* authoritative in light of the intervening statutory change and the carefully reasoned decision in this case.[9]

In 1972, Congress amended 42 U.S.C. 423(c)(2) to reduce the statutory waiting period from six to "five consecutive calendar months." The House Committee report included an example that reflects Congress' awareness and approval of the Secretary's interpretation as to when the waiting period begins (H.R. Rep. No. 92-231, *supra*, at 56; emphasis added):

> Your committee's bill would reduce the waiting period for disability insurance benefits by one month. Under present law, entitlement to disability benefits cannot

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months' means one half year," 435 F. 2d at 543, instead of a period of time beginning with the first day of a month, its decision was substantially undermined by the legislative history of the Social Security Amendments of 1972.

[9] *Otworth* rests only upon a general rule of liberal construction of the Social Security Act that must give way to the expressed contrary views of Congress.

Contrary to petitioner's assertion (Pet. 17) there is no conflict within the Fifth Circuit on this issue. Although the issue evidently was not raised there, *Davis* v. *Schweiker*, 641 F. 2d 283 (5th Cir. 1981), reflects the court's assumption that, as the Secretary maintains, the waiting period begins on the first day of the first full calendar month of disability. As the court below observed (Pet. App. 48 n.10), the question of when the waiting period begins was neither presented nor decided in *Malveaux* v. *Mathews*, 546 F. 2d 108 (5th Cir. 1977). The opinion in *Malveaux* contains only a casual assumption inconsistent with the decision in this case. In any event, a conflict of authority within the Fifth Circuit would not warrant this Court's review. Cf. *Wisniewski* v. *United States*, 353 U.S. 901 (1957). We note that petitioner did not seek en banc review of the court of appeals' decision adverse to her interest.

> begin until after a worker has been disabled throughout a waiting period of 6 consecutive full months. For example, *if a worker becomes disabled on January 10, the waiting period is the 6 full months February through July; his first month of entitlement to benefits is August, and the first benefit check is payable early in September.*

The Senate report contained virtually identical language (S. Rep. No. 92-1230, *supra*, at 158):

> Under present law, entitlement to disability benefits cannot begin until after a worker has been disabled throughout a waiting period of 6 consecutive full months. For example, if a worker becomes disabled on January 10, the waiting period is the 6 full months February through July; his first month of entitlement to benefits is August, and the first benefit check is payable early in September.

As the court of appeals recognized (Pet. App. 40 n.7), the language quoted above is entitled to great weight even though it is not part of the legislative history of Section 223(c)(2) as originally enacted. In enacting the 1972 amendment, Congress revisited and carefully readjusted the duration of the waiting period. It is incredible to suggest, as does petitioner (Pet. 15-16), that a disapproving Congress, fully aware of the Secretary's interpretation governing onset of the waiting period, simply allowed that view to go uncorrected, even though Congress was legislating on the duration of the waiting period. On the contrary, Congress plainly ratified the Secretary's views as to the onset of the waiting period in 1972. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *FHA* v. *Darlington, Inc.*, 358 U.S. 84, 90 (1958).[10]

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[10]As the court of appeals explained (Pet. App. 43-45 n.9), the Secretary's regulations concerning the statutory waiting period have, since at

b. Petitioner's assertion (Pet. 13) that no administrative burden would result from adoption of petitioner's interpretation of the waiting period is unfounded. As the court of appeals recognized (Pet. App. 46-47), by setting one date, the first day of each month, rather than as many as 31 different dates, on which to begin payments, administrative costs are reduced, and the assets of the Social Security System are instead channeled to the myriad beneficiaries nationwide. The Secretary's practice also eliminates partial monthly payments during the initial month of entitlement.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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least 1964, consistently treated the statutory waiting period as composed of calendar months, beginning on the first day of the month and extending through the last day, throughout which the applicant was continuously disabled. Petitioner's reliance (Pet. 18) upon 20 C.F.R. 404.315(d) (1980) is misplaced. The language cited ("This 5-month waiting period begins with a month in which you were both insured for disability and disabled.") simply does not support petitioner's contention.

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